SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1967

No. 767

LOUIS SANDERS, et al.,

Petitioners,

vs.

JOHN ERRECA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Citation to Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Statement	4
Reasons for Granting Certiorari	9
1. The Decision Below Results In Conflict With Decisions of Other Circuits.	9
2. The Decision Below Creates Doubt As To What Constitutes a Deprivation Of a Constitutionally Protected Right.	10
3. The Decision Below Creates Conflict With Federal Cases In Other Circuits Taking a Liberal View of Economic Rights Within Constitutional Protection.	14
Conclusion	19

Page

Appendices:

A. Statutes Involved 21

B. Opinion of the Court of Appeals 24

C. Judgment of the United States Court of Appeals 35

D. Additional Question Suggested 37

CASES CITED

	Page
Adams v. City of Park Ridge (1961, 7th Cir.), 293 F. 2d 585	15
Allegheny County v. Frank Mashuda Co., 360 U. S. 185	14
American Mercury, Inc. v. Chase, 13 F. 2d 224 (1926)	17
Armstrong v. United States, 364 U. S. 40	12
Bantam Books v. Sullivan, 372 U. S. 58	17
Barnes v. Merritt (1967, 5th Cir.), 376 F. 2d 8	15
Bradford v. Sherwood, No. 21204, 9th Circuit	13
Buchanan v. Warley, 245 U. S. 60	12
Cobb v. City of Malden (1953, 1st Cir.), 202 F. 2d 701	15
Corsican Productions v. Pitchess (1964, 9th Cir.), 338 F. 2d 441	15
Cuyahoga River Power Co. v. Akron, 240 U. S. 462	10

Page

Dalche v. Levee Commissioners (1930), 46 F. 2d 340 — 9

Dombrowski v. Pfister, 380 U. S. 479 — 17

Ehrlich v. Glasner (1965, 9th Cir.), 352 F. 2d 119 — 15, 16, 17

Ehrlich v. Glasner (1967, 9th Cir.), 374 F. 2d 681 — 15, 16, 17

Foster v. Detroit (1966), 254 F. Supp. 655 — 9, 10, 11

Foster v. Herley (1964), 330 F. 2d 87 — 9, 10, 11, 12, 13

Gilmore v. Sandersville R. Co. (1955), 149 F. Supp. 725 — 13

Glicker v. Michigan Liquor Control Division (1947, 6th Cir.), 160 F. 2d 96 — 15

Hornsby v. Allen (1964, 5th Cir.), 326 F. 2d 605 — 15

Indian Refining Co. v. Ambraw, etc. District (1932), 1 F. Supp. 937 — 12

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 — 19

	Page
Marshall v. Sawyer (1962, 9th Cir.), 301 F. 2d 639	16
McGuire v. Sadler (1964, 5th Cir.), 337 F. 2d 902	14
Mosher v. Phoenix, 287 U. S. 29	10
New State Ice Co. v. Liebman, 28 U. S. 262	12
Olmstead v. United States, 277 U. S. 438	18
People of Colorado v. District Court (1953), 207 F. 2d 50	10
Portsmouth Co. v. United States, 260 U. S. 327	11
Progress Development Co. v. Mitchell (1961), 286 F. 2d 222	10, 11, 13
Richards v. Washington Terminal Co., 233 U. S. 546	11
Sanders v. Erreca, 377 F. 2d 960	2
Sherwood v. Bradford (1965), 246 F. Supp. 550	13

Page

United States v. General Motors,
323 U. S. 373 11

CONSTITUTIONS

United States Constitution:

5th Amendment 11

14th Amendment 16

STATUTES

18 U. S. C. A. §1951(b)(2) 17

28 U. S. C. §1254(1) 2

28 U. S. C. A. §1331 4, 7, 9, 13, 21

28 U. S. C. A. §1343 4, 7, 10, 21

42 U. S. C. A. §1983
Civil Rights Act 4, 7, 10, 13, 16, 22

TEXTS

16 Am. Jur. 2d 695
Constitutional Law §366 12

42 Am. Jur. 189
Property §4 12

Page

Nichols on Eminent Domain,
Vol. 2, pp. 367-369, 407 12

Nichols on Eminent Domain,
Vol. 6, p. 576 13

Restatement of Torts,
§767, p. 66 17

Shapo: "Constitutional Tort:
Monroe v. Pape and the Frontiers
Beyond" 60 Northwestern Univ.
L. Rev. 277 (1965) 14

Stoebuck, "Condemnation by Nuisance:
The Airport Cases in Retrospect
and Prospect" 71 Dickinson L. Rev.
207 at 217 (1967) 11

RULES

Rules of the Supreme Court of the
United States:

Rule 19(1)(b) 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Louis Sanders, Fay Sanders, Harry Groode and Ruth Groode, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case.

CITATION TO OPINION BELOW

The decision of the U. S. District Court, Central District of California, was by means of an order which is unreported. (The grounds of the District Court decision are stated in the opinion of the Court of Appeals.) The opinion of the United States Court of Appeals for the Ninth Circuit, printed in Appendix "B" hereto, is reported at 377 F. 2d 960.

JURISDICTION

The judgment of the United States Court of Appeals, for the Ninth Circuit, was entered on May 25, 1967. A timely Petition for Rehearing was denied on July 28, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1). (Also see Rule 19(1)(b)).

QUESTIONS PRESENTED

1. Where a complaint alleges that state employees acting under color of their office and of state law, made false representations, fraudulent threats of litigation, and purported to enact a condemnation resolution without any intention of acting upon it, all for the purpose of coercing property owners into cessation of lawful

construction on and development of their land, so that at some future time, after the value of the property has been severely impaired due to the cessation of construction and pendency of the condemnation resolution, only a portion of such property could be taken without paying to the owners just compensation, and where such owners in reliance on the promises and in response to the threats of the state employees ceased construction and thereby suffered massive damages, and where the threatened and promised condemnation of the land was never carried out as threatened and promised, has there been a violation of the owner's constitutional guarantee against deprivation of property without due process of law so as to give a right of civil action within the jurisdiction of the federal courts?

2. Where a case is dismissed by the U. S. District Court on grounds going to the merits of the allegations in the Complaint, and the appeal by briefs and argument addresses itself to such grounds without mention of jurisdiction by court or counsel and where months later the Court of Appeals concludes in its opinion sua sponte, without citation of authority and without opportunity to be heard on the point that federal jurisdiction is lacking, have appellants been effectively deprived of meaningful appellate review, and thereby of due process of law?

See also Appendix "D".

STATUTES INVOLVED

The statutes whose construction is involved herein are:

28 U. S. C. A. § 1331;

28 U. S. C. A. § 1343;

42 U. S. C. A. § 1983.

They are printed in Appendix "A".

STATEMENT

Mr. and Mrs. Louis Sanders and Mr. and Mrs. Harry Groode are the owners of a 4. 78-acre parcel of land. The legal description in the complaint places the land in the San Fernando Valley, a suburban area of Los Angeles. In the past, the land was used as a shopping center. With the passage of time the owners decided to transform the older shopping center into a larger, modern shopping center (R. Vol. 1, p. 30).

To accomplish the transformation, the owners undertook the complex and expensive task of subdividing, planning, financing, etc. Architects, engineers, surveyors, and contractors were engaged. The necessary plans, bonds and permits were obtained. Leases were entered into with tenants for the new shopping center, tenants from the old shopping center

moved out, contracts were let, large expenses and liabilities incurred, and work commenced.

At this point in time, Pierson Pedley, one of the Respondents herein, contacted the owners and informed them that their 4.78-acre parcel was about to be taken for a freeway. Pedley, a Senior Right-of-Way Agent of the California Division of Highways, purporting to speak as a State employee acting within the scope of his employment and under color of State authority, told the owners to cease the work underway on the new shopping center. Pedley backed up his demand with a threat: if the owners did not stop as requested, the California Department of Public Works would immediately file a condemnation action and obtain an injunction preventing Appellants from further work on their new shopping center (R. Vol. 1, pp. 30-31).

In fact, Pedley's threats and promises were false, and known to him to be false. In the first place, the State had no intention of acquiring the 4.78 acres. Moreover, the California Department of Public Works could not then institute an action against the owners, as in March, 1965, there was no condemnation resolution authorizing such an action, nor an agreement with the City of Los Angeles regarding connections between the proposed freeway and surface streets. The true state of affairs was unknown to the owners who relied on Pedley's status as Senior Right-of-Way Agent speaking for the State (R. Vol. 1, p. 31).

On May 25, 1965, Respondents Bradford,

Guthrie, Houghteling, Woolley, Whitehurst, Kofman and Payne passed Condemnation Resolution Number C-7011 purporting to authorize the condemnation of all of the subject property. In fact, such resolution was passed solely to give color to Pedley's earlier threats. No intention ever existed to implement such a resolution, and, in fact,. it never was implemented. Following the adoption of such resolution, Respondent Erreca failed to cause any good faith steps to be taken for the acquisition of subject property, whether by purchase or condemnation (R. Vol. 1, pp. 31-32).

As a direct result of the above-described threats and false promises of Pedley, and the acts of the other Respondents whereby the form of the State's exercise of its power of eminent domain were invoked in bad faith, the owners complied with what they believed to be a lawful state directive, and suffered massive damages, in that they ceased construction which was thereby rendered useless, and in the process incurred large expenditures and liabilities (R. Vol. 1, p. 33).

Ten months after Pedley's initial threats, no good faith steps toward the acquisition of the subject property for a freeway had been taken. The owners commenced the instant action on January 10, 1966 in the U. S. District Court for the Southern District of California, Central Division. An amended complaint was filed on February 15, 1966. The contents of the amended complaint allege the facts stated above. The amended complaint is described in great detail

by the Circuit Court Opinion (Appendix "B") which virtually quotes it. 1/

The District Court, on motion of Respondents, dismissed the action not for lack of jurisdiction, but on the grounds that:

1. The acts alleged in the Amended Complaint do not constitute a taking or damaging of property within the protection afforded by the United States Constitution; and

2. That the Respondents (other than Pedley and Erreca) were acting as members of the California Highway Commission exercising a discretionary function and their acts were immune from civil liability (R. Vol. 1, p. 98).

The District Court had no evidence or affidavits before it which would indicate that the Defendants were or were not exercising any discretionary function. Moreover, Pedley and Erreca were not members of the California Highway Commission.

After the action in the U. S. District Court was commenced, Respondents passed another condemnation resolution which no longer authorized a taking of the subject property, but only a

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1/ The Opinion contains a factual inaccuracy: The amended complaint expressly relied on 28 U. S. C. A. §1331 and 28 U. S. C. A. §1343 as well as on 42 U. S. C. A. §1983 (R. Vol. 1, p. 29).

fraction thereof. 2/

Thereafter, a motion for new trial or in the alternative for an order vacating the order of dismissal followed, and was denied by the District Court (R. Vol. 1, p. 198).

The District Court order of dismissal was then appealed to the U. S. Court of Appeals for the Ninth Circuit. The briefs in the Circuit Court addressed themselves to the issues of law arising from the grounds upon which the District Court dismissed the case (primarily "immunity"). The question of federal jurisdiction was neither raised, nor argued. The court of appeal heard arguments on January 13, 1967. The argument before the circuit court lasted for approximately one and one half hours. This uncommonly long period of time devoted to argument (far in excess of time requested by counsel) was caused by numerous questions to counsel from the bench, all of which addressed themselves to the issues as presented. The subject of jurisdiction was never mentioned in argument or in briefs.

On May 25, 1967, the Circuit Court rendered its opinion affirming the order of the District Court, on the grounds of lack of federal jurisdiction. The Circuit Court opinion cites no authority in support of its conclusion.

2/ As this Petition is being prepared, yet another resolution has been passed, further reducing the amount of Petitioners' land sought to be taken.

Following the decision by the court of appeals, a timely petition for rehearing was filed. The petition for rehearing was denied, and the suggestion therein for a rehearing en banc was rejected on July 28, 1967.

This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING CERTIORARI

1. The Decision Below Results in Conflict With Decisions of Other Circuits.

The question of redress of wrongs inflicted on property owners by State employees acting under color of State law and purporting to exercise a state's power of eminent domain, has been considered repeatedly by the U. S. Courts of Appeal in recent years.

In Foster v. Herley (1964), 330 F. 2d 87, the Sixth Circuit found State officials liable, resting the federal jurisdiction upon the provisions of 28 U.S.C.A. §1331. 3/

3/ Also see Foster v. Detroit (1966), 254 F. Supp. 655, and Dalche v. Levee Commissioners (1930), 46 F. 2d 340.

In Progress Development Co. v. Mitchell (1961), 286 F. 2d 222, the Seventh Circuit held State officials liable under 42 U. S. C. A. §1983 with federal jurisdiction resting upon 28 U. S. C. A. §1343.

In People of Colorado v. District Court (1953), 207 F. 2d at 50, 57, the Tenth Circuit has indicated (by dictum) that State officials abusing the power of eminent domain are personally liable for damages caused by such abuse, without specifically referring to a jurisdictional statute.

In contrast with Foster, Mitchell and People of Colorado, the opinion in the case at bench concludes that there is no jurisdiction in the federal courts to entertain law suits based upon wrongful acts done by state employees purporting to act under color of state eminent domain laws.

The decision below also conflicts with Cuyahoga River Power Company v. Akron, 240 U. S. 462, and Mosher v. Phoenix, 287 U. S. 29.

2. The Decision Below Creates Doubt As to What Constitutes a Deprivation of a Constitutionally Protected Right.

The decision below purports to reach its

result upon the fact that no physical seizure of Petitioners' land occurred. Yet in both Foster and Mitchell physical seizure was not an element of the wrong complained of. It would appear that the court below equated "deprivation" and "taking". This is clear error - it renders the 5th Amendment's separate protections against deprivation of property without due process of law and against taking of property without just compensation redundant.

An owner can be deprived of property by being deprived of the attributes of ownership (e. g. use, enjoyment, improvement, leasing, borrowing against land as security, etc.) which make up his "bundle of sticks". Property is not a thing - it is a right, or a group of rights. United States v. General Motors, 323 U. S. 373 at 378. And one can also readily see that the deprivation can be brought about in a variety of ways without anyone so much as laying a finger on the land in question. 4/ Richards v. Washington Terminal Co., 233 U. S. 546; Portsmouth

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4/ The notion that physical seizure is the indispensable ingredient of taking has been long discarded by the courts and writers. See United States v. General Motors, supra, 323 U. S. at 378. It has recently been aptly termed the "primordial view of a 'taking' ". Stoebuck, "Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect", 71 Dickinson L. Rev. 207 at 217 (1967). A fortiori, physical seizure is not necessary to accomplish a deprivation of a right.

Co. v. United States, 260 U.S. 327; Armstrong v. United States, 364 U.S. 40; Nichols on Eminent Domain, Vol. 2, p. 407. The point has been succinctly stated by the Court in Indian Refining Co. v. Ambraw, etc. District (1932), 1 F. Supp. 937 at 939-940:

> "... a law is considered as being a deprivation of property within the meaning of this constitutional guarantee if it deprives the owner of one of its essential attributes, destroys its value, restricts or interupts its common, necessary, or profitable use, hampers the owner in the application of it to the purposes of trade, or imposes conditions upon the right to hold or use it and thereby seriously impairs its value. These general principles apply not only to statutes enacted by the legislature but to the action of executive officers generally."

Also see Buchanan v. Warley, 245 U.S. 60 at 74; New State Ice Co. v. Liebman, 28 U.S. 262 at 278-280; 42 Am. Jur. 189, Property §4; 16 Am. Jur. 2d 695, Constitutional Law §366; Nichols on Eminent Domain, Vol. 2, pp. 367-369, 407.

Foster v. Herley, supra, 330 F.2d 87, and the case at bench are particularly illustrative of how a parcel of land can for all practical purposes be destroyed as far as its value and enjoyment to the owner are concerned, without anything resembling physical seizure taking place.

Yet, the two cases reach opposite conclusions.

There is a dearth of Supreme Court cases dealing with the applicability of the Civil Rights Act (42 U. S. C. A. §1983) to situations where economic harm has been inflicted by state officials acting under color of state law. As a result, federal courts have been in doubt as to the statutory basis of their jurisdiction in dealing with such problems. Foster and Mitchell illustrate the doubt. Both of these cases recognize the constitutionally impermissible harm inflicted, and grant relief for abuse of the power of eminent domain by state officials. Yet, Mitchell looks to the Civil Rights Act, while Foster finds jurisdiction arising directly under the Constitution of the United States within the meaning of 28 U. S. C. A. §1331. 5/ Still other federal courts have taken a third position and indicated that federal jurisdiction in non-diversity cases involving interference with property rights can be found in both of the above

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5/ Other federal courts have granted relief under 28 U. S. C. A. §1331 in situations involving the abuse of the power of eminent domain by state officials. See e. g. Gilmore v. Sandersville R. Co. (1955), 149 F. Supp. 725; Sherwood v. Bradford (1965), 246 F. Supp. 550 (appeal dismissed by U. S. Court of Appeals for the 9th Circuit, sub nom. Bradford v. Sherwood, No. 21204). Also see Nichols on Eminent Domain, Vol. 6, p. 576.

statutes. E. g. McGuire v. Sadler (1964, 5th Cir.), 337 F. 2d 902 at 905.

3. The Decision Below Creates Conflict With Federal Cases in Other Circuits Taking a Liberal View of Economic Rights Within Constitutional Protection.

There is yet another reason why it is important that certiorari be granted in the case at bench. Recently there has been lively litigation in the federal courts [6] to redress a variety of wrongs, involving state officials' interference with a host of economic rights of individuals.

The decision below raises doubt as to the jurisdictional basis for such litigation. For, as observed in Allegheny County v. Frank Mashuda Co., 360 U. S. 185 at 192, eminent domain is no more mystically involved with sovereign prerogative than a host of various governmental activities carried out by the states and their subdivisions. If federal jurisdiction is lacking to entertain lawsuits involving state officials' abuses of the power of eminent domain, then

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6/ See, Shapo, "Constitutional Tort: Monroe v. Pape and The Frontiers Beyond" 60 Northwestern Univ. L. Rev. 277 (1965).

jurisdiction to entertain lawsuits involving other interferences with economic rights by state officials abusing other state activities, is necessarily in doubt.

Nor can one find a valid distinction in the concept of physical seizure upon which the Court of Appeals relied in the case at bench. For many of the rights, which have been the subject of other federal lawsuits, are incapable of physical seizure. For example, Cobb v. City of Malden (1953, 1st Cir.), 202 F. 2d 701, involved interference with teachers' contract rights. Corsican Productions v. Pitchess (1964, 9th Cir.), 338 F. 2d 441, involved threats of interference with commercial distribution of motion pictures. Adams v. City of Park Ridge (1961, 7th Cir.), 293 F. 2d 585, involved interference with the right to solicit funds for a particular charity. Ehrlich v. Glasner (1965, 9th Cir.), 352 F. 2d 119 and its second appeal, Ehrlich v. Glasner (1967, 9th Cir.), 374 F. 2d 681, involved wrongful legal action and threats thereof by state officials. And in Glicker v. Michigan Liquor Control Division (1947, 6th Cir.), 160 F. 2d 96, Hornsby v. Allen (1964, 5th Cir.), 326 F. 2d 605, and in Barnes v. Merritt (1967, 5th Cir.), 376 F. 2d 8, the wrong complained of consisted of an arbitrary denial

of a liquor license by local officials. 7/

In all of the above cases, and others, nothing was taken - nothing was physically seized. There was a deprivation of a right within the meaning of 42 U.S.C.A. §1983. Necessarily, all of the above cases have concluded that an interference with an economic right, causing a substantial economic detriment to the wronged person, constitutes a deprivation of property within the meaning of the 14th Amendment. The case at bench reaches a conflicting conclusion.

Of the above cases, the two Ehrlich opinions (352 F. 2d 119 and 374 F. 2d 681) are particularly noteworthy in juxtaposition with the case at bench. The second dismissal of the Ehrlich complaint was ordered by the same U. S. District Judge on the same day as the dismissal of the amended complaint in the case at bench. The

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7/ It seems incongruous that a citizen who has been denied a state's grant of authority to engage in the liquor business or denied access to gambling casinos (Marshall v. Sawyer [1962, 9th Cir.], 301 F. 2d 639) can find protection in the federal courts, while his neighbor, minding his own business, can be sought out by state officials, subjected to threats and fraud, coerced into a posture where he suffers massive damages, and yet find himself beyond the pale of federal judicial protection under the Constitution.

dismissal was on the same grounds: "immunity" of state officials (374 F. 2d at 682). A principal ingredient of both complaints was an allegation of coercive threats of wrongful legal action by state officials (see 352 F. 2d at 121). The opinions in both Ehrlich cases and the case at bench, were written by the same Circuit Judge. And yet, Ehrlich was reversed, with federal jurisdiction accepted as of course, while the case at bench was affirmed, the Court of Appeals noting that " ... the threat and promise of Pedley and the adoption by the appellees ... of the condemnation resolution imposed no legal restraint on appellants from continuing the construction of their shopping center and the further use and development of their property, which activities the appellants were at all times free to pursue." 377 F. 2d at 963-964.

Thus, in addition to the problem of conflict of decision discussed above, the case at bench also gives rise to an important question going to the heart of the relationship between government and the governed. It has been early recognized that the threat of litigation can be a powerful and brutal weapon. See Restatement of Torts, §767, p. 66. Also see 18 U. S. C. A. §1951(b)(2).

The celebrated case of American Mercury, Inc. v. Chase, 13 F. 2d 224, applied this point in 1926. It has found expression in other cases, e. g., Dombrowski v. Pfister, 380 U. S. 479. The rationale underlying the Court's reasoning was succinctly stated in Bantam Books v. Sullivan, 372 U. S. 58 at 68:

"People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around."

The opinion below in the case at bench turns its back on the above principle and chooses to overlook the potency and chilling effect of an official's coercive threat. Thereby, the court below embraced a view which encourages not merely an arm's length relationship between an individual and his government's officials, but rather an outright hostile relationship.

In view of the current expanding activities of governments, federal, state and local, the words of Mr. Justice Brandeis in his famous dissent in Olmstead v. United States, 277 U.S. 438 at 485, have even more meaning today than they had when uttered:

"Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example."

The compelling, if unpleasant, conclusion forced upon the reader of the opinion below is that fraud and coercive threats on the part of a state employee directed at an admittedly law-abiding citizen, are the norm which the government can teach by example without offending the constitutional notion of fairness. It is respectfully submitted that such a conclusion runs counter to the fundamental notion of fairness implicit in the Anglo-American system of

jurisprudence. It runs counter to our society's tenet that government is a beneficial force, rather than a tyrant. Petitioners submit that such a conclusion is repugnant to the concept of due process of law, described by Mr. Justice Frankfurter as: " ... a profound attitude of fairness between man and man, and more particularly between the individual and government, ... " (Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 at 162.)

CONCLUSION

There is a conflict among the circuits. They are in disagreement as to which statute confers jurisdiction upon federal courts to hear cases such as the one at bench, and as to whether such jurisdiction exists at all. The Supreme Court cases which have spoken directly on this point, in favor of federal jurisdiction, have been disregarded.

There is also conflict as to what constitutes a deprivation of a constitutionally protected right. Decisions run the gamut from extending liberal protection to intangible rights, to a refusal to find a constitutional violation unless physical seizure is alleged.

Ultimately, in the case at bench, the rights of admittedly innocent people to lawfully use their own land have been outrageously violated. The economic end-product of the life-times of two generations of two families has been crippled

by coercive acts of state employees - acts which even the court below recognized as fraudulent.

Only this Court can resolve these conflicts. Such resolution is needed.

For reasons having to do with the pragmatic problem of settling conflicts of opinion among circuits, and doubts as to foundations of federal jurisdiction, as well as for reasons of grave public policy going to the core of interaction between individual citizens and their government, Petitioners respectfully pray that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX "A"

Statutes Involved

Title 28 U. S. C. A. §1331.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub. L. 85-554, § 1, 72 Stat 415.

Title 28 U. S. C. A. § 1343.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the depriva-

tion of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637.

Title 42 U.S.C.A. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution

and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. § 1979.

APPENDIX "B"

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUIS SANDERS, FAY SANDERS, HARRY GROODE and RUTH GROODE, Appellants, vs. JOHN ERRECA, ROBERT B. BRADFORD, JAMES A. GUTHRIE, JOSEPH C. HOUGHTELING, ROGER S. WOOLLEY, WILLIAM S. WHITEHURST, ABRAHAM KOFMAN, FRANKLIN S. PAYNE, PIERSON L. PEDLEY, Appellees.	)	No. 21,153

[May 25, 1967]

On Appeal from the United States District Court for the Southern District of California, Central Division
[Now United States District Court for the Central District]

Before: BARNES, JERTBERG and DUNIWAY, Circuit Judges JERTBERG, Circuit Judge:

Appellants (plaintiffs in the District Court) appeal from an order of the District Court dismissing without leave to amend their amended complaint and action wherein they seek to recover from appellees (defendants in the District Court) damages under the Civil Rights Act (42 U. S. C. § 1983).

The original complaint was filed on January 10, 1966, and an amended complaint was filed on February 15, 1966.

The dismissal of the action on March 14, 1966, with prejudice, following a hearing on appellees' motion to dismiss on February 28, 1966, was made on the grounds:

1. That the acts alleged in the amended complaint do not constitute a taking or damaging of property within the protection afforded by the United States Constitution; and

2. That the appellees, who are alleged to be members of the California Highway Commission, were acting as members of said Commission exercising a discretionary function and that their action is, therefore, immune from civil liability.

On March 24, 1966, appellants moved the District Court for a new trial pursuant to Rule

59, or in the alternative, under Rule 60(b) for an order vacating the order of dismissal of appellants' action and permitting appellants to file a second amended complaint based upon newly discovered evidence which, by due diligence, could not have been discovered prior to the court's ruling.

Following hearing on appellants' motion on April 18, 1966, the motion was denied on April 21, 1966, on the grounds that:

1. The new facts failed to warrant the filing of an amended complaint; and

2. The failure of appellants to discover the new evidence was due to appellants' lack of diligence.

The amended complaint may be summarized as follows:

That the appellants are the owners of a certain parcel of land described as Lots 1 and 2, of Tract No. 22236, in the City of Los Angeles, County of Los Angeles, as shown on map recorded in Book 738, pages 24 and 25 of Maps, in the office of the County Recorder of Los Angeles County, which has an area of approximately 4.78 acres;

That appellants commenced a project whereby Lot 2 of the above described property would be transformed from its present older shopping center use into a larger, modern shopping center, and to that end appellants have subdivided,

obtained the necessary bonds and permits, employed the services of architects, engineers, contractors and surveyors for the purpose of designing and constructing the new shopping center, as well as lawyers to draw leases therefor;

That to insure the commercial success of the new shopping center appellants have negotiated and entered into leases with prospective tenants for the new shopping center, including Crocker Citizens National Bank and other business enterprises; that contracts had been let and work started in March 1965, and that tenants from the old shopping center moved out;

That the appellees are Pierson L. Pedley, employed as a Senior Right-of-Way Agent for the Department of Public Works of the State of California Division of Highways; John Erreca, Director of the California Department of Public Works and Administrative Officer of the California Highway Commission; Robert B. Bradford, James A. Guthrie, Joseph C. Houghteling, Roger S. Woolley, William S. Whitehurst, Abraham Kofman and Franklin S. Payne, members or officers of the Highway Commission of the State of California;

That in March, 1965, appellee Pierson Pedley informed appellants that all of the property above described would be taken in eminent domain by the State of California for the building of a freeway and requested appellants to cease construction and any further development of the property and stated that unless appellants

interrupted and ceased the work under way on the new shopping center and refrained from further work thereon, the California Department of Public Works would immediately file a condemnation action and obtain an injunction preventing appellants from further work on the new shopping center;

That such statements were made by Pedley for the purpose of inducing appellants to discontinue the development of the property; that appellants, relying on the statements of Pedley, stopped the construction of the new shopping center; that the statements made by Pedley were false and known by him to be false since in March, 1965 no condemnation action by the Department of Public Works could be commenced since at that time the members of the Highway Commission had not adopted a condemnation resolution, and no agreements had been reached with the City of Los Angeles regarding connections between the proposed freeway and surface streets, which facts were unknown to the appellants at that time who relied on the representations of Pedley;

That approximately two months later, and on May 25, 1965, the appellees named as members of the Highway Commission passed Condemnation Resolution No. C-7011, authorizing the condemnation of all of appellants' property above described for highway purposes. A copy of the resolution is attached to and made a part of the amended complaint;

That such resolution was passed in bad

faith to cloud the title to appellants' property; that said resolution has not been implemented as its mere passage accomplished the goal of the appellees, and there appeared to be no intent to implement the resolution in the foreseeable future; that notwithstanding the adoption of such resolution appellee Erreca has failed to cause any good faith steps to be taken for the acquisition of the property;

That Erreca and Pedley have wrongfully and in bad faith caused the acquisition of said property to be delayed for the purpose of destroying any possibility of the completion of the appellants' shopping center and for the purpose of destroying the value of said property;

That by reason of the fraudulent representations by Pedley, and by reason of the passage of the resolution by the members of the Highway Commission, appellant's property has effectively been taken by depriving appellants of their right and opportunity to use, develop, lease and encumber their property; that by reason of the acts of appellees the property cannot be leased nor can loans be secured against it; that no compensation for taking the appellants' property has been made to appellants in violation of the Fifth and Fourteenth Amendments to the United States Constitution;

That in making fraudulent representations for the purpose of inducing appellants to discontinue work on the new shopping center, and in passing the condemnation resolution in bad faith, and without making any compensation to

appellants for the taking and damaging of appellants' property, caused by the above acts, appellees have abused their position and power as state employees and officers, and under color of state statute, ordinance, regulation, custom and usage have subjected appellants to the deprivation of appellants' rights secured by the United States Constitution and laws which provide that appellants' property cannot be taken except for public use and then only upon payment of just compensation;

That in discontinuing the construction of the new shopping center, and in reliance on the fraudulent representations of Pedley and the passage of said condemnation resolution, appellants were forced to incur liabilities for accounts payable to persons and corporations from whom services and equipment were obtained by appellants for the new shopping center; such accounts payable are in the approximate amount of $164,252.80. That in addition appellants, as of November 1, 1965, had actually paid $54,147.63 to persons and corporations from whom services and supplies were obtained in connection with the development of the new shopping center; that such services, supplies and equipment have been of no benefit to appellants; that in addition, by reason of the acts of the appellees described above, appellants have been deprived of the use and rents of the subject property from March, 1965, and have not been compensated therefor.

The amended complaint seeks judgment against appellees in the sum of $250,000.00 and

for an order commanding appellees Erreca and Pedley to either proceed with the condemnation of appellants' property, or cease interfering with appellants' construction thereon, and rights.

The appeal in this case also presents for review by us the propriety of the order of the District Court denying appellants' alternative motion for a new trial or for an order vacating the order of dismissal of appellants' action and permitting the filing of a second amended complaint. The motion was based on newly discovered evidence.

The new evidence consists of: (1) a published article by appellee, Houghteling, purporting to show that the acts performed by the appellees who were members of the Highway Commission are not discretionary in character but rather give rubber stamp approval to the acts of appellee, Erreca, the Director of the California Department of Public works; and (2) the adoption on February 16, 1966, by the appellees, named as members of the Highway Commission, of Condemnation Resolution C-7298, authorizing the condemnation of only portions of Lots 1 and 2, together with specified rights and easements to enter upon the remaining portions of Lots 1 and 2, and the filing by appellees on March 7, 1966, of a complaint in eminent domain in the Superior Court of the State of California in and for the County of Los Angeles, Action No. 880137, to condemn the property described in the Condemnation Resolution of February 16, 1966. Affidavits in support of, and in opposition to, the motion were filed.

We have considered the memoranda, documents and affidavits submitted in connection with the motion. We are unable to say that the District Court abused its discretion in refusing to grant a new trial or in refusing to permit the filing of a second amended complaint.

The allegations of the amended complaint charge that appellants' real property was not taken for public use by the State of California because the appellees, acting fraudulently, in bad faith, in abuse of their duties as state officials, and under color of state law, failed to cause condemnation proceedings to be filed in court for the purpose of acquiring such real property for public use. We are aware of no federal right, statutory or constitutional, under which a private person may compel a sovereign to take such person's private property for public use and secure just compensation therefor. There is no allegation in the amended complaint that any property or property rights claimed by appellants were taken by appellees for public use. The State of California is not a party to the action. Hence, appellants do not, and cannot claim that any property or any claimed property right has been taken for public use and for which they are entitled to just compensation under the clause of the Fifth Amendment which provides: " ; nor shall private property be taken for public use, without just compensation", or under the clause of the Fourteenth Amendment which provides: " ; nor shall any state deprive any person of * * *, * * *, or property, without due process of law;".

The gist of the amended complaint is that appellants suffered a claimed monetary loss in the claimed sum of $250,000.00 since they stopped construction of the new shopping center and the further use and development of their property because of the threat of Pedley to get an injunction, and their reliance upon his promise that a condemnation action would be immediately filed. Clearly, the threat and promise of Pedley and the adoption by the appellees named as members of the Highway Commission of a condemnation resolution imposed no legal restraint on appellants from continuing the construction of their shopping center and the further use and development of their property, which activities the appellants were at all times free to pursue.

There is no allegation in the amended complaint that appellees entered into possession of any part of appellants' property, trespassed thereon, or physically interfered in any way with appellants' control and dominion of their property.

In essence, the amended complaint is one to recover a claimed monetary loss based upon fraud and deceit, cognizable perhaps under state law in a state court, but the claim does not invoke the jurisdiction of the federal court in this non-diversity action. In order to do so, the amended complaint must allege facts which show that appellants were subjected to the deprivation of a right, privilege or immunity secured by the Constitution and laws of the United States. Appellants have failed to do so. The allegations

that the acts of appellees violated the provisions of the Fifth and Fourteenth Amendments appear to us to be a pretext to invoke federal jurisdiction.

In view of our holding we deem it unnecessary to pass upon other questions presented on this appeal.

The order appealed from is affirmed.

APPENDIX "C"

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUIS SANDERS, FAY SANDERS, HARRY GROODE and RUTH GROODE, Appellants, vs. JOHN ERRECA, ROBERT B. BRADFORD, JAMES A. GUTHRIE, JOSEPH C. HOUGHTELING, ROGER S. WOOLLEY, WILLIAM S. WHITEHURST, ABRAHAM KOFMAN, FRANKLIN S. PAYNE, PIERSON L. PEDLEY, Appellees.	)	No. 21,153

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of

California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 25, 1967

APPENDIX "D"

Additional Question Suggested

In the light of Rule 23 (1)(c) and the Court's admonition in Irvine v. California, 347 U. S. 128, 129, the following additional question is also suggested:

> Are state employees immune from civil liability in federal courts, where it is alleged that such employees and officials acting under color of their office have wrongfully and fraudulently deprived a plaintiff of his property rights secured by the due process clause of the 14th Amendment?